IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16118 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUKESHBHAI UKABHAI CHUNARA

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 16118 of 2003

MS DR KACHHAVAH for Petitioner No. 1

MR KAMLESH KACHHAVAH for Petitioner No. 1

MR LR PUJARI Ld. AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 04/03/2004

ORAL JUDGEMENT

1. Heard Mr.Kamlesh Kachhavah, learned advocate for

the petitioner and Mr.L.R.Pujari, learned AGP for the respondents.

2. In this petition under Article 226 of the Constitution of India, the petitioner has been challenging the order of detention dated 4.9.2003 (Annexure-A) passed by respondent no.1 under the provisions of Gujarat Prevention of Anti-Social Activities Act,1985 (hereinafter referred to as "the PASA Act") and prays for quashing and setting of the impugned order of detention.

3. The grounds of detention (Annexure-B) suggest that as many as 5 cases under the Bombay Prohibition Act came to be filed against the petitioner on different dates in the year 2003, alleging the petitioner to be a 'bootlegger'. The statement of two witnesses for the incident of 25.8.2003 and 3.8.2003 respectively have been recorded to suggest the petitioner is a bootlegger dealing in the sale of liquor. Privilege under Section 9(2) of the PASA Act has been invoked withholding the identity of the witnesses, two statements have been recorded. It is stated that the activity of bootlegging being injurious to the public health, is an obstruction for the maintenance of public order and therefore, the detention order passed against the petitioner - detenu under Section 3 of the PASA Act.

4. Challenging the impugned detention order, it has been submitted by the learned advocate that there is no proper exercise of powers under Section 9(2) of the PASA Act for invoking the privilege withholding the identity of the witnesses inasmuch as there is no exercise undertaken by the detaining authority to verify the genuineness of the statements made by the witnesses nor any verification about the genuineness of the fear / apprehension expressed by the witnesses. It is further contended that there is no contemporaneous material on the basis of which it could be said that the incident alleged against the petitioner did take place and that there is nothing to show verification of the veracity of the incident alleged against the petitioner.

5. In the case of Kajalben G. Sindhi V. Commissioner of Police, 2000 (1) GLH 320 and Kishore Naginbhai Parmar Vs. State of Gujarat & Ors, 2000(4) GLR 3236, it has been observed by this Court that, "mere statement of witnesses expressing fear would not be sufficient, also as regards the correctness and the genuineness of the statements in absence of any contemporaneous material. The detaining authority has to

take into consideration the background, the antecedents, the character, etc. of the detenu while considering the need for exercise of powers under Section 9(2) of the PASA Act. The authority has to scale the right of the detenu of making an effective representation on the one hand and the public interest on the other and has to strike the balance between the two. The detaining authority has not filed any affidavit nor is there contemporaneous material to indicate undertaking of such exercise by the detaining authority and therefore, the exercise of powers under Section 9(2) of the PASA Act cannot be said to have been properly exercised and therefore, the exercise of powers under Section 9(2) of the PASA Act vitiated ....."

6. In the instant case also, there is no contemporaneous material to suggest any exercise undertaken by the detaining authority as regards the genuineness of the statement as well as the verification of the veracity of the incident over and above the background of the detenu along with the antecedent, character etc. of the detenu. In absence of proper exercise of powers under Section 9(2) of the PASA Act, it cannot be said that the detaining authority, for the purpose of exercising privilege, has undertaken the exercise as required in law. Except the bare statement of the witnesses in the instant case verified by the detaining authority, which is nothing but reiteration of what the witnesses stated before the police authority, there is no other material on the basis of which it can be said that the powers under Section 9(2) of the PASA Act was the proper exercise of powers by the detaining authority.

7. In the above view of the matter, the impugned detention order is liable to be quashed and set aside.

8. In the result, the petition is granted and accordingly allowed. The impugned order of detention dated 4.9.2003 (Annexure-A) passed by respondent no.1 against the petitioner-detenu -Mukeshbhai Ukabhai Chunara is hereby quashed and set aside. The petitioner -detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly. Direct service is permitted."

(N.G.Nandi,J.)

(vipul)